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Impact of Maine Civil Laws on the Wabanaki: 1997 - 2000

Maine Indian Tribal-State Commission

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**Impact of Maine Civil Laws
on the Wabanaki:**

1997 - 2000

**A Report by the
Maine Indian Tribal-State Commission**

**Submitted Pursuant to
Resolves 1997, Chapter 45**

**to the
120th Maine Legislature**

December 15, 2000

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Executive Summary

Overview

Resolves 1997, Chapter 45, authorizes the Maine Indian Tribal-State Commission (MITSC) to undertake a review of the civil laws of Maine over four years to determine whether and how these laws affect the ability of the Tribes to regulate their members, lands, schools, cultural institutions, and communities in a way that honors tribal traditions. The resolve instructs MITSC to keep in mind the best interests of children and to identify policies and programs that can foster social and economic strength for the Tribes without posing a significant risk of harm to the resources of the State or to the property or rights of non-tribal members. The resolve also requires MITSC to convene an annual Assembly of tribal and state governors and chiefs. This report to the 120th Legislature is last of three required.

MITSC has examined issues relating to child welfare, tribal courts, the economic basis of Tribal Government, education and culture, Indian Territory, natural resources and environment, and the Maliseet quest to amend the Settlement Act. Over the past four years, MITSC has focused on legislation and other activities relating to all of these issues and has convened four successful Assemblies. There have been some successes, but many challenges remain.

Legislation Enacted

MITSC has been involved in different ways with several pieces of legislation related to the civil law review that have been enacted over the past four years:

Child Welfare: After having many tribal-state discussions and a workshop on child welfare issues, MITSC introduced LD 523 in early 1999. This bill provided that federal IV-E funds will be available for Indian children, and it affirmed that the Tribes may license their own foster homes. The Legislature enacted the bill, which was signed into law as Public Law 1999, Chapter 392.

Economic Basis of Tribal Government: In 1999, Passamaquoddy Legislative Representative Donald Soctomah Tribe introduced LD 1029 to allow sales tax revenues generated by businesses on the reservations to flow to the Tribe rather than to the State. MITSC discussed this quite extensively. The bill passed with an amendment to have the State handle the collection of the sales taxes for on-reservation businesses and then give the Tribes a rebate. It was signed into law as Public Law 1999, Chapter 477.

Education and Culture: In 1998, the Legislature enacted a bill based on a recommendation in MITSC's 1997 civil law review report. Public Law 1997, Chapter 650 provides that the Passamaquoddy Tribe may change the names of features in their Indian Territory. Passamaquoddy Legislative Representative Donald Soctomah introduced LD 2418 on behalf of MITSC to the Second Regular Session of the 119th Legislature to prohibit the use of the word "squaw" in place names. MITSC prepared a summary of issues and views that the Legislature used

extensively in its discussions about the bill. The Legislature passed LD 2481 by an overwhelming margin, and the bill was enacted into law as Public Law 1999, Chapter 613.

As the result of the efforts of Representative Soctomah, working closely with the Maine Historic Preservation Commission, LD 2549 (An Act to Implement Recommendations Concerning the Protection of Indian Archaeological Sites) also was introduced to the Second Regular Session of the 119th Legislature. This was enacted as Public Law 1999, Chapter 748.

Indian Territory: MITSC supported LD 2499, Penobscot Legislative Representative Donna Loring's bill to the 119th Legislature to extend the deadline for acquiring 150,000 acres of Penobscot Indian Territory under the Maine Indian Claims Settlement Act by 20 years. The bill easily passed the Legislature and was enacted into law as Public Law 1999, Chapter 625.

Natural Resources and Environment: The Passamaquoddy Tribe introduced LD 2145 to the 118th Legislature concerning the taking of marine resources by tribal members. The Tribe did not seek MITSC's involvement, and the bill was signed into law as Public Law 1997, Chapter 708. During 1999 two related issues surfaced at MITSC. One was the Penobscot Nation's interest in being included in the law. The second was concern about the constant need to remind legislators that the law exempts tribal members from holding certain state licenses and permits.

Legislation Defeated

MITSC has devoted a substantial amount of time and effort to several other bills related to the civil law review that have been defeated over the past four years:

Tribal Court Orders: MITSC had many tribal-state discussions and a workshop about the enforcement of Tribal Court orders beyond Indian Territory. MITSC introduced LD 426 in early 1999 to require Maine institutions to recognize and enforce Tribal Court orders. The Legislature did not pass the bill.

Economic Basis of Tribal Government: MITSC examined the Tribes' concerns that their reservations had been excluded from a new property homestead tax exemption law. In 1999 the Passamaquoddy Tribe introduced LD 1247 to extend the exemption to the Penobscot and Passamaquoddy reservations. MITSC supported this, but the Legislature did not pass it.

Maine law allows the Penobscot Nation and Passamaquoddy Tribe to operate high-stakes beano within Indian Territory. MITSC opposed LD 793, a bill to limit gaming to their reservations. MITSC members felt that an existing law that is being legally followed by the Tribes should not be changed just because of opposition from a particular area (in this case, Albany Township). The Legislature did not pass LD 793.

Education and Culture: In 1999 the Passamaquoddy Tribe introduced LD 1384 to exempt the sales of traditional crafts products made by tribal members, and materials purchased to create those crafts, from sales and use tax. MITSC presented a letter to the Legislature in favor of LD 1384, pointing out that it supported an important aspect of Wabanaki culture. However, the bill did not pass.

Indian Territory: In sharp contrast to LD 2499, which had the unanimous support of MITSC and sailed through the Legislature, LD 2607 relating to Passamaquoddy land in Albany Township was extremely contentious. At the heart of the controversy was the intended use of the land by the Tribe. The issue temporarily harmed the working relationships within MITSC itself. The bill was defeated by the Legislature after prolonged debate.

Natural Resources and Environment: There have been intensive tribal-state discussions and several failed legislative attempts involving natural resources and the environment:

- ⇒ MITSC proposed LD 1961 to the 118th Legislature to clarify the regulation of land use by the Tribes, but this failed to pass by a single vote. MITSC then proposed LD 2030 to the 119th Legislature to exempt Indian Territory from the jurisdiction of the Land Use Regulation Commission, but this also was defeated.
- ⇒ In early 1998 MITSC supported an amendment to LD 1730, the Great Ponds Task Force bill, to authorize MITSC to regulate the use of motors on certain ponds within Indian Territory. This was passed by the Legislature, but the Tribes did not ratify this new provision and it did not take effect.
- ⇒ In 1999 the Passamaquoddy Tribe introduced LD 1255 to have the Tribes regulate the surface use of waters in their Indian Territories. There was not consensus among MITSC members about the language in the bill. Eventually, MITSC members agreed on a proposed amendment, but the Tribes did not support it. LD 1255 did not pass.
- ⇒ In 1999 the Passamaquoddy Tribe proposed LD 1914 to provide for concurrent tribal and state jurisdiction on rights-of-way and highways passing through reservations and Indian Territory and to provide that fines flow to the Tribes. Because its members could not agree about most of the bill, MITSC testified neither for nor against it. The Legislature did not pass LD 1914.

Maliseet Legislation: LD 2178 proposed to amend the Maine Indian Claims Settlement Implementing Act concerning the Houlton Band of Maliseets. Introduced during the First Regular Session of the 119th Legislature, the bill was held over until the Second Regular Session. MITSC supported having the Houlton Band participate on the same or similar terms as the Passamaquoddy Tribe and the Penobscot Nation. MITSC facilitated and participated in numerous meetings to help secure the passage of LD 2178. During negotiations, the State and the Maliseets came close to consensus, but the Maliseets and the City of Houlton remained far apart. In the end, the Legislature killed the bill.

Other Initiatives

Education and Culture: MITSC's review of civil laws led to several activities relating to education and culture that did not involve legislation:

- ⇒ In early 2000 MITSC hosted a workshop on tribal sovereignty at the 119th Legislature. This was presented from the tribal perspective so legislators could gain a fuller understanding of this complex issue and can see that there is a reasonable, legitimate basis for differences in views. In March 2000 MITSC co-sponsored Diversity Day at the Legislature.
- ⇒ Issues relating to the use of Baxter State Park for the annual Sacred Run to Katahdin first came to MITSC's attention during the 1998 Assembly of Governors and Chiefs. In October 2000, after two years of discussion, the Baxter State Park Authority approved an agreement with the Wabanakis.
- ⇒ The first-ever Wabanaki Day at the Legislature was held in April 1999, to inform legislators about Wabanaki culture and values. Tribal members of all ages from all the Wabanaki communities in Maine came to Augusta for this spectacular day. Wabanaki Day was received positively by legislators and others at the State House.

Natural Resources and Environment: One of the most divisive issues between the State and the Tribes in recent months has been the National Pollution Discharge Elimination System (NPDES) delegation process. In January 2000 MITSC hosted a meeting to explore tribal and state views about this federal process that authorizes States to administer major program elements of the federal Clean Water Act. Early in the year and again in early November, MITSC encouraged the parties to have facilitated discussions in order to try to resolve their differences. However, this suggestion has not been accepted, and the dispute is being fought vigorously in the courts.

An offshoot of the NPDES dispute is a major argument over whether the State's Freedom of Access Act (FOAA) applies to the Tribes. In November 2000, a Superior Court Judge ruled that three Tribal Governors must either turn over tribal documents requested by paper companies, appeal his decision, or go to jail. The Governors reluctantly decided to appeal the decision. Several MITSC members have commented that they never imagined that a state court would sentence Tribal Governors to jail. Several have stated that documents generated by the Tribes are the business of the Tribes and should be exempt from the FOAA. MITSC is developing a statement regarding the FOAA.

Recommendations for the Legislature

MITSC strongly urges the 120th Legislature to:

- ⇒ Create a new legislative mechanism for addressing tribal and tribal-state issues, such as a Joint Select Committee on Indian Affairs or a Standing Subcommittee of the Judiciary Committee.
- ⇒ Enact legislation to allow MITSC to introduce bills relating to tribal-state issues.

- ⇒ Enact legislation to continue the annual Assembly of Governors and Chiefs, and to add a biennial Assembly of Legislators and Tribal Council Members.
- ⇒ Seriously consider legislation which will be presented by Passamaquoddy Legislative Representative Donald Soctomah to add land in T19 MD in Washington County to Indian Territory.
- ⇒ Seriously consider legislation which will be presented by Penobscot Legislative Representative Donna Loring to make sure that Wabanaki History is taught in Maine public schools.
- ⇒ Seriously consider legislation, if proposed, to enact terms in the Maine Indian Claims Settlement Act for the Houlton Band of Maliseets that are similar to the terms already in the Act for the Passamaquoddy Tribe and Penobscot Nation.
- ⇒ Support the permanent appropriation of \$15,000 in state funds for MITSC, as requested by Governor King in his Part II Budget. (This amount was appropriated in 1999 only for that biennium, and is badly needed for effective MITSC functioning.)

MITSC's Next Steps

As revealed by MITSC's review of the impact of Maine's civil laws on the Wabanaki, the Tribes and State have fundamentally different views about key aspects of the Settlement Act. A major MITSC activity in the coming months will be to analyze the key areas of disagreement from perspective of the State, the Tribes, and MITSC itself. For each disputed area examined, MITSC will look at the words in the Settlement Act, the legal rationale, the cultural rationale, fears and concerns, and whether there is room for rapprochement between the State and the Tribes.

1. Introduction

A. The Resolve

Resolves 1997, Chapter 45, hereafter referred to as the “resolve”, authorizes and directs the Maine Indian Tribal-State Commission (MITSC) to undertake a systematic review of the civil laws of the State of Maine over a period of four years. In accordance with the resolve (see Attachment 1), the purpose of the review has been to determine the manner and extent to which these laws, as enforced, impinge upon the best interests of children with respect to the:

- ⇒ Traditional culture and way of life in tribal communities;
- ⇒ Ability of the Tribes to regulate their members, lands, schools and other cultural institutions, and communities in a manner that honors tribal traditions; and
- ⇒ Respect and dignity given to all citizens in the State and members of the Tribes.

The resolve requires MITSC to identify policies and programs that could foster social and economic strength for the Tribes without posing a significant risk of harm to the resources of the State held for the benefit of all or to property or rights of people who are not members of the Tribes. The resolve instructs MITSC to consult with appropriate representatives of the State and Tribes; use conflict resolution techniques; and determine how to address concerns underlying legislation to amend the Act to Implement the Maine Indian Claims Settlement proposed by the Passamaquoddy Tribe during the First Regular Session of the 118th Legislature.

The resolve also requires MITSC to convene an annual Assembly of Governors and Chiefs. Included are the Governors of the State of Maine, the Passamaquoddy Tribe at Indian Township (Motahkmikuk), the Passamaquoddy Tribe at Pleasant Point (Sipayik), and the Penobscot Nation, and the Chiefs of the Aroostook Band of Micmacs and the Houlton Band of Maliseets.

B. This Report

The resolve requires MITSC to report its findings and recommendations to the Legislature on December 15 of the years 1997, 1998, and 2000. MITSC is submitting this year’s report, which is the final one required, to the five Tribal Councils, as well as to the Legislature. The report’s purpose is to inform state and tribal elected officials about MITSC’s discussions and recommendations resulting from this civil law review process.

This introduction not only describes the resolve, but also summarizes the two previous civil law review reports and the Assembly of Governors and Chiefs required by the resolve. Section 2 of the report is a brief description of the Maine Indian Tribal-State Commission. Sections 3 through 8 describe the major issues that MITSC has reviewed as part of its review of civil laws. Section 9 presents recommendations for consideration by the Legislature and the Tribal Councils.

C. 1997 Civil Law Review Report

MITSC's 1997 report submitted pursuant to the resolve--"Impact of Maine Civil Laws on the Wabanaki" (December 15, 1997)--described five issues to be tackled as a result of MITSC's initial study and discussion of the civil laws of Maine. MITSC recommended legislation to address two of the issues:

- ⇒ *Tribal Land Use*. A bill to clarify the process by which the Tribes could control land use and development and protect natural resources within unorganized and deorganized lands within Indian Territory; and
- ⇒ *Place Names*. A bill to affirm that the Passamaquoddy Tribe may change the names of features in Indian Territory and to instruct MITSC to study and develop a proposal for changing offensive names beyond Indian Territory.

With regard to the other three issues, MITSC indicated that further study and discussion were needed to:

- ⇒ *Child Welfare*. Examine the Tribes' position that under the Indian Child Welfare Act children under their jurisdiction should be entitled to the same level of financial support as children within the custody of the Department of Human Services;
- ⇒ *Tribal Court Orders*. Ensure the enforcement of Tribal Court orders--in particular those of the Passamaquoddy Tribal Court--beyond the reservations; and
- ⇒ *Economic Basis of Tribal Government*. Determine how to strengthen the economic basis of Tribal Government.

D. 1998 Civil Law Review Report

MITSC's second report submitted pursuant to the resolve--"Impact of Maine Civil Laws on the Wabanaki: 1998" (December 15, 1998)--described seven issues explored as part of the second year's review of the civil laws of Maine. MITSC recommended legislation to address three of these issues:

- ⇒ *Tribal Land Use*. A second bill to clarify the regulation of tribal land use, since MITSC's 1997 bill was killed by a single vote;
- ⇒ *Child Welfare*. A bill to provide full faith and credit for tribal foster home licensure and to make federal IV-E money available for Indian children under tribal jurisdiction; and
- ⇒ *Tribal Court Orders*. A bill to clarify that there must be enforcement of and compliance with Tribal Court orders not only on the reservation but also off the reservation.

With regard to the four other issues, MITSC reported that:

- ⇒ *Surface Use of Tribal Waters*. Agreement had not been reached about the regulation of the surface use of tribal inland waters;
- ⇒ *Economic Basis of Tribal Government*. It was continuing its work on how to generate revenues for Tribal Government;

- ⇒ *Marine Issues*. A new law (Public Law 1997, Chapter 708) required MITSC to study any question or issue regarding the taking of marine resources by tribal members; and
- ⇒ *Sovereignty*. Different views about the meaning and extent of tribal sovereignty are at the heart of the major jurisdictional disagreements between the State and the Tribes.

E. Assemblies of Governors and Chiefs

MITSC has organized the Assembly of Governors and Chiefs in early December of 1997, 1998, 1999, and 2000. This annual event, which has been expanded to include the Passamaquoddy and Penobscot Legislative Representatives, has provided elected leaders with a valued opportunity to meet face to face to discuss tribal-state issues of concern. The Assembly also has played a major role in guiding MITSC's work.

2. The Maine Indian Tribal-State Commission

A. Statutory Responsibilities

Created by the Maine Indian Claims Settlement Act of 1980, MITSC is a part-time inter-governmental entity. Its five responsibilities are specified in the Act:

- ⇒ To continually review the effectiveness of the Act and the social, economic, and legal relationship between the Passamaquoddy Tribe and Penobscot Nation and the State of Maine. 30 MRSA §6212(3)
- ⇒ To make recommendations about the acquisition of certain lands to be included in Passamaquoddy and Penobscot Indian Territory. 30 MRSA §6205(5)
- ⇒ To promulgate fishing rules on certain inland waters. 30 MRSA §6207(3)
- ⇒ To make recommendations about fish and wildlife management policies on non-Indian lands, to protect fish and wildlife stocks on lands and water subject to regulation by the Passamaquoddy Tribe, the Penobscot Nation, or the Commission. 30 MRSA §6207(8)
- ⇒ To review petitions by the Tribes for designation as an "extended reservation." 30 MRSA §6209(5)

B. Members, Staff, and Committees

MITSC has nine members, including four appointed by the State, two by the Penobscot Nation, and two by the Passamaquoddy Tribe. The ninth member is the Chair, who is selected by the eight appointees. Cushman D. Anthony, Esq. serves as MITSC's chair. The State MITSC members are Alan Brigham, Mike Hastings, Fred Hurley, and Evan Richert. The Penobscot MITSC members are John Banks and Mark Chavaree. Wayne Newell is the Passamaquoddy MITSC member from Motahkmikuk (Indian Township). As a result of their frustration with the State and MITSC, particularly in relation to the process and decisions relating to Albany

Township, the Passamaquoddy Tribe at Sipayik (Pleasant Point) has chosen not to fill its MITSC seat over the past several months. MITSC has a part-time Executive Director, Diana Scully, who is an independent contractor.

In 1997, at the outset of the civil law review process, MITSC established a Civil Law Review Committee to perform the work required by the resolve. MITSC quickly realized that the resolve is so sweeping that it relates to almost every issue in which MITSC is involved. In 1998, with that in mind, MITSC reorganized its work into four substantive Committees: Child Welfare and Tribal Courts; Economic Basis of Tribal Government; Education; and Natural Resources and Environment. It was understood that issues addressed by all the Committees are related to the resolve.

C. Funding

MITSC's funding comes from the State and the Tribes. During fiscal year 2000, MITSC received \$38,150 from the State, \$11,575 from the Passamaquoddy Tribe, and \$11,575 from the Penobscot Nation. The State's contribution included an appropriation of \$15,000, resulting from a bill submitted by Representative Doug Ahearne (LD1341) to provide additional funding to MITSC. Because this bill passed as a one-time biennial appropriation, the \$15,000 will not continue past June 30, 2001, unless it is appropriated anew on a permanent basis.

3. Child Welfare and Tribal Courts

A. Child Welfare

In late 1997 and early 1998, the Tribes and the State tried to reach agreement about legislation regarding the regulation of foster homes in Indian Territory and access to Title IV-E federal funds for Indian children under tribal jurisdiction. The parties were not able to reach consensus in time for the 118th Legislature.

In August 1998 MITSC held a workshop to examine these issues further. There was agreement that there should be full faith and credit for tribal foster home licensure and that to accomplish this legislation was needed. There also was agreement that federal IV-E money should be available for Indian children. When MITSC submitted its 1998 report pursuant to Resolves 1997, Chapter 45, it noted that the Department of Human Services was planning to introduce legislation to the 119th Legislature to address these issues. Because MITSC did not know what the Department would be proposing, it also recommended legislation.

Printed up as LD 523 in early 1999, MITSC's bill sought to correct Maine's foster care licensing and funding statutes by recognizing the authority of the Maine Tribes under the federal Indian Child Welfare Act (ICWA). Application of ICWA in Maine was incorporated in the Maine Indian Land Claims Settlement in 1980, but corresponding amendments to state law were not made at that time. Under existing federal and state laws, Maine Tribes may license and approve foster homes for Indian children, and tribal licensing is deemed equivalent to licensing

approval by the State. LD 523 stated that federal IV-E funds will be available for Indian children. It also recognized what is implicit in ICWA--that the Tribes may license their own foster homes. The Legislature enacted the bill, which was signed into law as Public Law 1999, Chapter 392.

Since the legislation passed, the Department of Human Services and each Tribe have been negotiating agreements relating to Title IV-E. MITSC has not received any requests for assistance with this process, which appears to be proceeding smoothly.

B. Enforcement of Tribal Court Orders

In 1997, the Passamaquoddy Tribe, in particular, was concerned about the enforcement of Tribal Court decisions beyond the reservations. MITSC had several discussions about this and convened a meeting of state and tribal lawyers to discuss the legal procedures involved. At the time of the 1997 civil law review report deadline, MITSC was in the process of identifying what specifically needed to be fixed.

During an August 1998 workshop on child welfare and the courts, a participant from the Attorney General's office agreed to explore what needs to happen to make sure tribal court orders are enforced. His initial look at this led him to conclude that there is indeed a problem with enforcement outside Indian Territory; legislation is required to resolve the problem; there may or may not be constitutional issues involved; and it is doubtful that Tribal Court can issue contempt bench warrants.

MITSC's 1998 civil law review report included recommended legislation relating to the enforcement of tribal court orders. Printed up as LD 426, MITSC's bill required that Maine institutions should recognize and enforce Tribal Court orders. The Department of Attorney General opposed the bill, arguing that if a legitimate governmental court order is not being executed, the proper procedure for giving full faith and credit to that order would be to ask a State Court to issue an order implement it. LD 426 was designed to be a short circuit of this process, and the Attorney General felt that this was inappropriate. The Legislature did not pass LD 426.

During subsequent discussions about the Legislature's failure to pass LD 426, the representatives of the Penobscot Nation's Tribal Court indicated that the enforcement of Tribal Court orders had not been a problem for them and suggested that this should be matter of relationships with local people. During these discussions, a representative of the Passamaquoddy Tribe pointed out that state law enforcement personnel frequently go directly to Tribal Police, not to Tribal Court. It was suggested that in the future, the Tribe may choose to require the State to bring actions to Tribal Court, not to Tribal Police.

4. Economic Basis of Tribal Government

A. Overview

MITSC reported on the economic basis of Tribal Government in both its 1997 and 1998 civil law review reports. Because land is held in common by tribal members, there are no property taxes to support the operation of Tribal Government. Thus, MITSC has been examining how other revenue raised by the Tribes might stay with the Tribes. It is important to understand that tribal businesses, including beano, are part of Tribal Government.

B. Homestead Tax Exemption

In 1998, MITSC reviewed tribal concerns about the exclusion of the reservations from the property homestead tax exemption legislation enacted by the 118th Legislature. In the State's view, the homestead tax exemption was part of an array of tax relief, and all taxpayers in Maine received some relief. In the Tribes' view, because tribal members pay sales and income taxes, they contributed to the surplus in state level taxes that made the homestead tax exemption possible. They also felt that the exemption was passed without adequate consultation with or consideration of the Tribes.

In 1999, the Passamaquoddy Tribe introduced LD 1247 to the 119th Legislature. This bill proposed to extend the homestead tax exemption to the Passamaquoddy Tribe and Penobscot Nation. During its March 1999 meeting, MITSC voted unanimously to testify in support of the bill before the Taxation Committee. MITSC pointed out that for deeply imbedded cultural reasons, land is held in common by tribal members. They do not pay property taxes and, thus, there are no property taxes to support Tribal Government. MITSC also stated that even though individual tribal members do not own land, Tribal Governments do own land for use by tribal members and they do pay property taxes. For example, the Penobscot Nation pays approximately \$77,000 in property taxes and the Passamaquoddy Tribe pays approximately \$45,000-\$47,000. In contrast, the cost of including the three reservations in the Homestead Tax Exemption program is estimated to a bit more than \$77,000. The Legislature did not pass LD 1247.

C. Sales Tax

Another bill introduced by the Passamaquoddy Tribe in 1999 was LD 1029, a bill to encourage support of Passamaquoddy Tribal Government through on-reservation business activities. Under the bill, sales tax revenues generated by businesses on the reservations would flow to the Tribe rather than to the State. MITSC took no position on this bill. The bill passed the Taxation Committee with an amendment to have the State handle the collection of the sales taxes for on-reservation businesses and then give the Tribes a rebate. The bill was enacted and signed into law as Public Law 1999, Chapter 477.

D. Gaming

In 1999, MITSC voted unanimously to submit a letter to the Judiciary Committee in opposition to LD 793, a bill sponsored by Senator Peter Mills to limit gaming to the reservations. MITSC pointed out that current Maine law allows the Penobscot Nation and Passamaquoddy Tribe to operate high-stakes beano within Indian Territory. MITSC members felt that a law that is being legally followed by the Tribes should not be changed just because of opposition from a particular area (in this case, Albany Township). MITSC indicated that it supports the right of the Tribes to engage in economic development activities that they believe are necessary to support their Tribal Governments and people, but its vote to oppose LD 793 should be viewed as neutral with respect to the use of gambling as a economic development activity. The Legislature did not pass LD 793.

E. Fines

A recurring issue before MITSC has been the flow of fines. This has come up during discussions about traffic violations on state roads passing through the Passamaquoddy reservations, rights of way through Indian Territory, and the enforcement fish and wildlife laws. The Tribes have concerns that when their personnel enforce state laws, they incur the costs but the fines do not flow to them to cover those costs.

5. Education and Culture**A. Passamaquoddy Place Names**

A recommendation in MITSC's 1997 civil law review report was a bill to affirm that the Joint Tribal Council of the Passamaquoddy Tribe may change the names of features in Passamaquoddy Territory and to instruct MITSC to study and develop a proposal for changing offensive names beyond Indian Territory. This legislation was enacted as Public Law 1997, Chapter 650.

B. Offensive Place Names

Passamaquoddy Legislative Representative Donald Soctomah introduced LD 2418 to the Second Regular Session of the 119th Legislature on behalf of MITSC to prohibit the use of the word "squaw" in place names in Maine. MITSC prepared a summary of issues and views about this issue that the Legislature used extensively in its discussions about the bill.

MITSC's research revealed that there were twenty-five known geographic features in seven counties with the word "squaw" or "squa." MITSC found that, consistent with the dictionary definitions of "squaw", there is a high degree of consensus (though not 100%) that the word has a derogatory meaning today.

The January 2000 hearing on LD 2418 before the Judiciary Committee was dramatic. Scores of Wabanaki women--Maliseet, Micmac, Passamaquoddy, and Penobscot--came to Augusta from all parts of Maine to speak from their hearts about how much the word "sq--" has hurt them. There were young girls, elders, and women of all ages in between. Joining them were many Wabanaki men, as well as members of other Tribes. It was not just native people who came to ask the Legislature to drop "sq--" from place names. Representatives of the Catholic Diocese of Maine, Committee on Indian Relations of the Episcopal Diocese of Maine, Friends Committee on Maine Public Policy, Maine AFL-CIO, Maine Council of Churches, Maine Human Rights Commission, Maine Lesbian Gay Political Alliance, Maine Women's Lobby, and National Coalition Building Institute all came to testify in support of LD 2418.

All five Tribal Governments in Maine passed resolutions in support of LD 2418, as did United South and Eastern Tribes, an inter-tribal organization consisting of 23 federally recognized Tribes. Other supporters included Governor King, the NAACP, the Maine Holocaust Human Rights Center, and former Representative Jerry Talbot, the first African-American person to serve in the Maine Legislature. During the mid-1970s, Representative Talbot introduced and successfully fought for enactment of legislation to drop the "N" word from place names in Maine.

After the hearing on LD 2418, the vote out of committee was 12 to 1 to endorse the bill, as amended. The changes were friendly, technical amendments. The Legislature passed LD 2481 by an overwhelming margin, and the bill was enacted into law as Public Law 1999, Chapter 613.

C. Honoring Native Women

An issue brought to MITSC's attention during its meeting of March 2000 was the offensive use of the word "sq--" by KISS 94.5 radio station in relation to the newly minted dollar coin. MITSC decided to urge the Legislature to issue a joint resolution and to have individual MITSC members write letters to the radio station. The Legislature later enacted a "Joint Resolution Declaring 2000 the Year of the Native American Woman," which was sponsored by Penobscot Legislative Representative Donna Loring.

D. Wabanaki Day

The first ever Wabanaki Day at the Legislature was held in April 1999, to inform legislators about Wabanaki culture and values. This was supported by a grant from the Department of Economic and Community Development, in-kind staff support by the Federal Highway Administration, and hard work by the Tribal Representatives to the Legislature and MITSC.

The day opened with drumming and singing on the rotunda of the fourth floor as legislators arrived to attend House and Senate sessions. Traditional blessings offered by Passamaquoddy and Penobscot tribal members opened the morning sessions of the House and Senate. Children from the Passamaquoddy, Penobscot, and Maliseet grammar schools served as pages in both chambers. During the

sessions, the tribal delegations were recognized and Legislative Sentiments were read and approved in honor of former Tribal Representatives and others.

Drumming, singing, and dancing heralded a formal ceremony in the Hall of Flags held late in the morning. Governor Angus King read a proclamation declaring Wabanaki Day. Tribal Governors and Chiefs and Legislative Leaders made comments. The Passamaquoddy Tribe presented an exquisite, beaded state seal to the State of Maine. The event closed with more singing.

Wabanaki Day also featured a Wabanaki art exhibit in Senate President's Office; an ash-pounding demonstration; Wabanaki videos; more than 15 displays in the Hall of Flags by Maine's four Tribes and associated organizations; a traditional lunch of hulled corn soup, moose meat, and fry bread; and more drumming, singing, and dancing.

MITSC members agree that this large event should happen during the first year of each new Legislature. It has been suggested that MITSC might sponsor a smaller event at the Legislature during the second year of each Legislature.

E. Diversity Day

At the request of Passamaquoddy Legislative Representative Donald Soctomah and House Assistant Minority Leader Richard Campbell, MITSC cosponsored Diversity Day at the Legislature in March 2000. Also participating in the event were Maine people of Wabanaki, African American, French, and Greek heritage.

F. Education about Sovereignty

In its 1998 civil law review report, MITSC reviewed that Resolves 1997, Chapter 45 required it to determine how to address concerns underlying Passamaquoddy legislation to amend the Settlement Act during the First Regular Session of the 118th Legislature. MITSC indicated that sovereignty was at the heart of this legislation, and it recommended that state and tribal elected leaders have extended discussions about what sovereignty means. MITSC stated its belief that greater understanding would help protect the Tribes' traditional culture and way of life and their ability to govern their members, lands, schools, cultural institutions, and communities in a manner that honors tribal traditions.

In February 2000 MITSC hosted a lunch-time workshop on tribal sovereignty at the 119th Legislature. The workshop was presented from the tribal perspective so legislators could gain a fuller understanding of this complex issue and can see that there is a reasonable, legitimate basis for differences in views. The workshop was a factual, educational session--not a confrontational debate. It featured speaker Jill Shibles, Esq., a member of the Penobscot Nation. At that time, Ms. Shibles was the Chief Judge of the Mashantucket Pequot Tribal Court in Connecticut, the Appellate Judge of the Passamaquoddy Tribal Appellate Court, and the First Vice President of the National American Indian Court Judges Association. (Recently, Ms. Shibles moved to Colorado to be the new Executive Director of the National

Tribal Justice Resource Center.) Seven legislators cosponsored the workshop, and twenty-six legislators and two legislative staff members attended it.

G. Traditional Crafts

MITSC supported LD 1384, introduced by the Passamaquoddy Legislative Representative Donald Soctomah in 1999. This bill proposed that sales of traditional crafts products made by members of Passamaquoddy Tribe and materials purchased to create those crafts be exempt from sales and use tax. MITSC sent a letter of support to the Taxation Committee, indicating that it also would favor the inclusion of the Penobscot Nation, Houlton Band of Maliseets, and Aroostook Band of Micmacs if they wanted to be included. The Legislature did not pass LD 1384.

H. Indian Archaeological Site Protection

As the result of the efforts of Passamaquoddy Legislative Representative Donald Soctomah, working closely with the Maine Historic Preservation Commission, LD 2549 (An Act to Implement Recommendations Concerning the Protection of Indian Archaeological Sites) was introduced to the Second Regular Session of the 119th Legislature. This was enacted as Public Law 1999, Chapter 748.

I. Tribal Use of Baxter State Park

Issues relating to the use of Baxter State Park for the annual Sacred Run to Katahdin first came to MITSC's attention during the 1998 Assembly of Governors and Chiefs. During an update during the 1999 Assembly, Penobscot participants explained that they had been making progress with the Baxter State Authority in discussions about the exemption of fees and a special ceremonial place in the Park for the Sacred Run. However, after receiving an opinion from the Attorney General's office, the Baxter State Park Authority refused to do anything, saying that if they do it for the Penobscots they must do it for everyone else.

MITSC discussed this issue during their January and February 2000 meetings. Under consideration was whether MITSC should help facilitate a workshop for the Baxter State Authority and their Advisory Committee about the cultural and spiritual issues involved with Katahdin. Some felt that for MITSC to be involved, both parties must invite MITSC. The Penobscots participating in the discussion responded by indicating that they would handle the educational session without MITSC's help.

On October 20, 2000, after two years of discussion, the Baxter State Park Authority approved an agreement with the Wabanakis. Katahdin Stream Campground will continue to be available over Labor Day weekend for the Sacred Run and there is an area on West Branch lands for vision quests and tobacco offering ceremonies.

6. Indian Territory

A. Deadline for Acquiring Penobscot Indian Territory

In January 2000, Penobscot Legislative Representative Donna Loring asked MITSC to support legislation to extend the deadline for acquiring 150,000 acres of Indian Territory under the Maine Indian Claims Settlement Act by 20 years. This had been extended at least two times before. MITSC unanimously supported this legislation.

The February hearing before the Judiciary Committee on LD 2499, Representative Loring's bill, went quite well. MITSC testified that 30 MRSA §6205(2) allows the Penobscot Nation to acquire 150,000 acres in Indian Territory by January 2001, but that only around 55,000 acres have been included so far. MITSC stated its support for extending the deadline by 20 years. The Judiciary Committee unanimously supported LD 2499. It easily passed the Legislature and was enacted into law as Public Law 1999, Chapter 625.

B. Passamaquoddy Land in Albany Township

In sharp contrast to LD 2499, LD 2607 (An Act Concerning Previous Passamaquoddy Indian Territory Legislation) was extremely controversial. On February 7, 2000, the Maine Supreme Judicial Court issued a decision in Kimball v. LURC regarding a parcel of land in Albany Township previously considered to be part of Passamaquoddy Indian Territory. During MITSC's February meeting, Passamaquoddy Legislative Representative Donald Soctomah reported that the judge said there is an error in the statute that affects the status of this parcel. He sponsored LD 2607 to correct the error. The judge said the parcel is not in Indian Territory, because even though it was added to the list of lands that may be placed in trust, it was not placed in trust until after the deadline specified in the statute.

Opponents of LD 2607 argued that in 1992 there was no consideration of the Albany Township parcel as an island within a community, and noted that the parcel was understood to be a farm or a place for troubled youth. Interested persons from Albany Township indicated that months later, when there were news articles saying the Passamaquoddy Tribe had an interest in gambling, they began to worry that the intended use was incompatible with the nature of the surrounding community.

Supporters of LD 2607 reviewed that during the 1980s, the Attorney General told MITSC that there are two ways to approve land, and one way does not have a deadline. They noted that enacting LD 2081 back in 1992, which approved placing the Albany Township parcel of land in Indian Territory, involved both state and tribal laws. They expressed strong concern that private litigants got the state court to rule that this bilateral process is invalid. In their view, this undermined the integrity of the process the Legislature and Tribes went through in 1992, as well as the integrity of Settlement Act as a whole.

On January 22, 1991, MITSC voted unanimously "to support legislation to add the farm in Albany Township owned by the Passamaquoddy Tribe to the list of territory that can be held in trust for the Tribe." Then on December 17, 1991, MITSC voted unanimously "to reaffirm its support of legislation proposed by the Passamaquoddy Tribe to place into trust the small farm in Albany Township." These votes were important, because when a Tribe wants to add land to Indian Territory that is not already mentioned 30 MRSA §6205, MITSC is required to make a recommendation. However, in making its recommendation, MITSC did not follow its bylaws requiring public notice about the Tribe's proposal.

On February 4, 1992, MITSC presented testimony to the Judiciary Committee in support of LD 2081, the bill to add this land to Indian Territory. The Legislature passed the bill during that Session, and it was enacted as Public Law 1991, Chapter 720.

During its March 2000 meeting, MITSC discussed what action it ought to take on LD 2607. Several MITSC members believed that the actions taken in 1991 and conveyed to the Legislature in 1992 were sufficient, and MITSC did not need to undertake a full review of the matter again. Other members believed that MITSC needed to go through its review process anew, including public notice, because they felt that LD 2607 was as a new proposal. With one state member absent, MITSC's vote on LD 2607 was five in favor (four tribal members and the chair) and three against (three state members.) Those who voted against the motion to support the bill clarified that they did so because they felt the public notice provisions of MITSC's bylaws should be applied before taking action, and there was not enough time to undertake that process prior the March 15, 2000 hearing on the bill. It was agreed that MITSC would present a letter in support of LD 2607 during the hearing.

In a separate letter written to the Judiciary Committee, MITSC's state members directly presented their concerns. MITSC's tribal members felt betrayed by this action by their state colleagues. In the end, the Legislature killed LD 2607.

At the heart of the controversy about Albany Township was the intended use of the land by the Tribe. During MITSC's October 2000 meeting, there was discussion about a provision in MITSC's bylaws relating to the use of the land:

The Commission shall not consider issues raised regarding the restrictions on the use of lands which any landowner, Indian or non-Indian, could implement.

MITSC is not supposed to consider land use if anyone else can do the same thing on that land. Any legal use of the land is acceptable, so long as it can be used this way by any citizen--native or non-native. One of MITSC's members recalled that the biggest concern in the early days after the Settlement was that the Tribes would post their land, and this is why this provision is in the bylaws.

MITSC never has used any formal criteria in its review of potential lands to be added to Indian Territory. Most parcels that have come before MITSC have been similar to the lands on the original lists in 30 MRSA §6205--remote, uninhabited

parcels in unorganized territory. MITSC simply has made determinations based on comments received.

In the early days after the Settlement, MITSC did not encounter lands in unorganized territory that were on the periphery of organized territory. In contrast, the Passamaquoddy Tribe's land in Albany Township is a small parcel in the middle of a community. Some of MITSC members are concerned about having a small parcel of Indian Territory in the middle of something else. In organized areas, the municipal officials must approve the addition of tribal-owned lands to Indian Territory. Albany Township did not have this opportunity, because it is not organized.

MITSC members agree that MITSC cannot anticipate everything and does not need to have criteria. They also agree that central to the Maine Indian Claims Settlement Act is the re-acquisition of a land base of 150,000 acres by each of the Tribes that is of benefit to them--not just for hunting and fishing, but also for economic development.

C. Adding New Land to Passamaquoddy Indian Territory

On November 14, 2000, Passamaquoddy Legislative Representative Donald Soctomah asked MITSC to begin its process to review the addition of land that the Passamaquoddy Tribe owns in T19 MD in Washington County to Indian Territory. MITSC voted unanimously that upon receipt of certification by the Passamaquoddy Tribe that it has approved this action, MITSC will place a legal advertisement and take other steps in accordance with its bylaws to receive public comment before it makes a recommendation regarding the addition of this land to Indian Territory.

7. Natural Resources and Environment

A. National Pollution Discharge Elimination System Dispute

One of the most divisive issues between the State and the Tribes during the Year 2000 has been the National Pollution Discharge Elimination System (NPDES) delegation process. Delegation is a federal process under the Environmental Protection Agency (EPA) that authorizes States to administer major program elements of the federal Clean Water Act.

During the 1999 Assembly, it was noted that the Tribes and the State are on a collision course with regard to the environment. Tribal leaders were concerned that the State had applied to EPA to handle pollution discharges and stated that the Tribes have no jurisdiction over any waters. They also expressed concern that while EPA and the Tribes were willing to meet to discuss this, the State was not.

In January 2000 MITSC hosted a meeting to discuss NPDES. Participants (representatives of the Maine Department of Environmental Protection, MITSC, and others) identified three areas of dispute:

- ⇒ The Tribes believe that the Federal Government has a trust responsibility and the State disputes this.
- ⇒ The Penobscots believe they own all the Penobscot River from Indian Island north, including the branches and the tributaries and the State disputes this. There are similar issues for the Passamaquoddy Tribe and the Maliseets.
- ⇒ The Tribes believe that sustenance fishing rights should mean the ability to catch and consume fish from these waters without fear of adverse health impacts, which is another reason the State should not take jurisdiction. The State disagrees.

MITSC learned that the Attorney General had declined to participate in mediated discussion of this issue. It was agreed that MITSC would request a meeting with the Attorney General to explore issues relating to NPDES. When MITSC's Chair sent the letter, as agreed, the Attorney General responded that it would be better for someone else from his office to be involved in the meeting. During its February 2000 meeting, MITSC decided that it had done what it could and should drop this issue for the time being.

Several months later, during MITSC's October meeting, the Chair noted that the two sides were preparing for battle and asked whether there is a further role for MITSC in the NPDES delegation issue. It was agreed that MITSC should write a letter to ask if there is willingness to engage in facilitated discussion and that the letter should go to Governor King, all Tribal Governors and Chiefs, the Attorney General, and EPA's Region I Administrator. It was noted that an agreement in this area cannot work unless the Tribes and the State acknowledge each other's positions and both positions are given equal weight.

The letter from MITSC's Chair is included as Attachment 2. Here are some excerpts from it:

At the last meeting of [MITSC], we noted with chagrin the continuing dispute between the State of Maine and the Tribes regarding the proposed delegation of NPDES permitting authority to the State. We observed that this conflict appears to be consuming a great deal of time, attention, and financial resources, and is increasing the discomfort and mistrust between the Tribes and the State...

It is clear to us that a major problem exists that needs to be resolved in some fashion...We believe...that resolving that problem through facilitated negotiations would involve far less damage to the relationships between the Tribes and the State, and at lower cost, than would happen through litigation.

B. Freedom of Access Act Court Case

An offshoot of the NPDES dispute is a major argument over whether the State's Freedom of Access Act (FOAA) applies to the Tribes. On November 9, 2000, a Superior Court Judge ruled that by November 13 three Tribal Governors must either turn over tribal documents requested by paper companies, appeal his decision, or go to jail. The Governors reluctantly decided to appeal the decision.

There was extensive discussion about this case during MITSC's November 14 meeting. Several MITSC members commented that they never imagined that a state

court would sentence Tribal Governors to jail. Several stated that documents generated by the Tribes are the business of the Tribes and should be exempt from the FOAA. MITSC members agreed that MITSC should gather more information about the positions of the Tribes, the State, and the paper companies. MITSC is in the process of developing a statement regarding the FOAA.

C. Regulation of Tribal Land Use

In 1997 and 1998, MITSC focused on negotiating an arrangement for the regulation of land use in Indian Territory in which neither side conceded the basic question of whether the Tribes have jurisdiction or have to go through the procedures to get out from the jurisdiction of the Land Use Regulation Commission. Under the arrangement, viewed as a clarification, MITSC was to review comprehensive plans by the Tribes, and once MITSC passed the plans, there would be no dispute about tribal authority. There was discussion about excluding Albany Township or areas of 500 acres or less, because of the controversy surrounding the small parcel of Passamaquoddy land located there. MITSC took this arrangement to the 118th Legislature via LD 1961 and negotiated it there. MITSC won the majority support of the Judiciary Committee, the majority support of the House, and a 16-16 tie in the Senate. The Conference Committee could not resolve this, and the legislation lost as the result of a single vote.

As part of its December 1998 civil law review report, MITSC described two possible paths for resolving the issue of tribal land use regulation. One path was to enter into a tribal-state cooperative agreement. The other was to propose a new bill, which MITSC did as part of the report. During its January 1999 meeting, the Passamaquoddy Tribe favored the legislative path, while the Penobscot Tribal Council preferred the cooperative agreement path. MITSC also discussed a recent Superior Court decision on Albany Township, which stated in a footnote that the Tribes have jurisdiction over their own lands. The footnote indicated that the Passamaquoddy Tribe is treated like a municipality and does not have to go through the Land Use Regulation Commission process.

In March 1999, MITSC voted unanimously to submit a new draft to replace its original bill. The amendment added Indian Territory to the list of exemptions from LURC jurisdiction, excluded Albany Township from the bill because of pending litigation, and included both the Passamaquoddy Tribe and the Penobscot Nation. The bill was printed up as LD 2030. During work sessions on the bill before the Judiciary Committee, paper companies voiced concerns about the bill's impact on the regulation of impoundments, Albany Township continued to be an issue, and Penobscot concerns also were an issue. The Legislature did not pass LD 2030.

From the State's perspective, it is difficult to enter into a tribal-state cooperative agreement about land use, because no state agency has authorization to do this. LD 2030 would have provided this authorization to the Land Use Regulation Commission. Both the Penobscot Nation and Passamaquoddy Tribe are moving ahead to take care of their lands in the way they think is right.

D. Regulation of Surface Use of Inland Waters

During the 1997 Assembly of Governors and Chiefs it was agreed that MITSC should review issues relating to the surface use of waters in Indian Territory. In early 1998, MITSC asked the 118th Legislature to consider an amendment to LD 1730, the Great Ponds Task Force bill. The proposal amended the Maine Implementing Act to authorize MITSC to regulate the use of motors on ponds less than 200 acres within Indian Territory and used for fishing. (The 200 acres was based on LD 1730's proposal to regulate jet skis on all Maine ponds of 200 acres or less.) The Legislature enacted this provision, adding a further requirement that the waters must be entirely within Indian Territory.

During a June 1998 workshop sponsored by MITSC, it became clear that the Tribes were not going to ratify the new law enacted by the Legislature. In the end, the law did not take effect.

In December 1998, MITSC submitted a report about the surface use of tribal inland waters (required by Public Law 1997, Chapter 739) to the Legislature's Joint Standing Committee on Inland Fisheries and Wildlife. The report indicated that there were three different ideas about how to proceed on regulating the surface use of waters: by amending the Maine Indian Claims Settlement Act to piggyback onto MITSC's regulatory authority over fishing; by amending the Act to piggyback onto the Tribe's regulatory authority over hunting and trapping; or by cooperative agreement.

MITSC discussions of early 1999, revealed that the State preferred having MITSC regulate surface use or a cooperative agreement, while the Tribes supported regulating surface use themselves. The Passamaquoddy Tribe introduced LD 1255 to have the Tribes regulate the surface use of waters in their Indian Territories. Passamaquoddy and Penobscot MITSC members supported the bill, while State MITSC members opposed it. State MITSC members were not against the idea that Tribes should have more control over surface use, but they opposed the way of doing it in LD 1255. During its March 1999 meeting, MITSC voted (six in favor and one abstention) to approve an amendment, contingent on approval by both Tribes, which:

- ⇒ Stated that MITSC has jurisdiction over the regulation of surface water use on great ponds (those of 10 acres or more) within Indian Territory;
- ⇒ Specified that MITSC may delegate this regulatory authority to the Passamaquoddy Tribe for great ponds with 50% or more of shoreline within Passamaquoddy territory and to the Penobscot Nation for great ponds with 50% or more of shoreline within Penobscot territory;
- ⇒ Listed the factors to be considered and the process to be followed in rule-making; and
- ⇒ Required the Commission to submit a report on the effectiveness of this approach and any recommendations, including legislation, to the 121st Legislature by December 15, 2002.

MITSC shared the amendment with the Judiciary Committee, but the Tribes did not approve it. In Committee, the Attorney General, the Natural Resources Council, the paper companies, and the Governor's Office were all against the LD 1255, and the Legislature did not pass it.

E. Rights of Way

In 1999, the Passamaquoddy Tribe proposed LD 1914 to the 119th Legislature to provide for concurrent tribal jurisdiction on rights of way and highways passing through reservations and Indian Territory and to provide that fines flow to the Tribes. It was clear that State and Tribal MITSC members could not reach agreement about most of LD 1914. However, MITSC members did agree that civil penalties and criminal fines imposed for a violation of tribal or state law within Indian territory should be remitted by the court imposing the penalty or fine to the Passamaquoddy Tribe or the Penobscot Nation. During the hearing on LD 1914 before the Judiciary Committee, MITSC testified neither for nor against the bill, though it indicated support for the flow of penalties and fines to the Tribes. The Legislature did not pass LD 1914.

In addition to the flow of fines, MITSC's discussions about rights of way touched on the following points:

- ⇒ There are enforcement problems on "no man's land" (strips of land running through Indian territory), because the Tribes do not have jurisdiction over these areas. For example, people can go down a right-of-way to hunt and be outside of tribal ordinances.
- ⇒ It makes sense to allow the enforcement of tribal laws over tribal members on rights of way through Indian territory.
- ⇒ Tribal members are concerned about non-tribal members harming the resources of the Tribes. Non-tribal hunters on rights-of-way are a major part of the problem that led the Passamaquoddy Tribe to submit LD 1914.
- ⇒ The power of municipalities extends over state roads that pass through a municipality, but the Tribes do not have that same power.

F. MITSC Fishing Rules

In 1999, the Penobscot Nation asked MITSC to develop new rules to license commercial fishing under its jurisdiction. The rule development process has been delayed because several divisive issues have commanded MITSC's attention. MITSC plans to tackle these rules during 2001. Commercial licensing would involve eels, bait dealers, mussels, commercial fishing of alewives, and other activities. There is not complete agreement between the Penobscot Nation and the State about where the Tribe has jurisdiction and where it does not have jurisdiction. MITSC will work on rules for waters where there is agreement. Licensing would present a new level of operational responsibilities for MITSC.

G. Salmon

During MITSC's September 1999 meeting, it was reported that there were new developments between the Passamaquoddy Tribe and the Land Use Regulation Commission involving the cultivation of blueberries and cranberries, on one hand, and protecting Atlantic salmon, on the other hand. From the Tribe's perspective, they did not want to endanger salmon, but they did want to preserve self-governance over their land. From the State's perspective, the Tribe's lands are subject to the State's environmental laws. The Passamaquoddy Tribe said it would talk about this situation further and might conclude that there is a role for MITSC to play. In the end, neither the Tribe nor the State requested MITSC's involvement.

H. Marine Issues

The Passamaquoddy Tribe at Pleasant Point (Sipayik) first brought concerns about marine resources to MITSC in 1984 and has raised the issue many times since then. During the 1990s, MITSC facilitated a meeting between officials of the Tribe and the Department of Marine Resources, endorsed Passamaquoddy efforts to amend federal legislation, and discussed preparing a policy paper on this topic (which never happened because of a lack of resources). Some argued that MITSC should not be involved in this area, because marine issues are not specifically mentioned in the Maine Indian Claims Settlement Act. Others contended that MITSC should be involved, because this is a key area that affects the economic and legal relationship between the State and the Tribe.

During the 118th Legislature, the Passamaquoddy Tribe submitted LD 2145, "An Act Concerning the Taking of Marine Resources by Members of the Passamaquoddy Tribe". The Tribe did not seek MITSC's involvement in this legislation, which passed and was signed into law as Public Law 1997, Chapter 708. The law required MITSC to "study any question or issue regarding the taking of marine resources by members of the Passamaquoddy Tribe and Penobscot Nation" and to report to the 119th Legislature's Joint Standing Committee on Marine Resources. MITSC submitted its report in December 1998, noting that it had written to ask the Tribes to formulate a list of issues and questions.

During 1999 two issues relating to the new law surfaced at MITSC. One was the Penobscot Nation's interest in being included as part of the law. The second was the Passamaquoddy Tribe's concern about the constant challenge involved in reminding legislators that the new law exempts tribal members from holding certain state licenses and permits. In addition, there was discussion about the relationship between economic development and salt water rights and resources.

8. Maliseet Quest to Amend the Settlement Act

A. Initial Bill

In 1999, during the First Regular Session of the 119th Legislature, Representative Roger Sherman sponsored LD 2178, a concept bill to amend the Implementing Act concerning the Houlton Band of Maliseets. MITSC members noted that a major difference between the proposal and the Maine Indian Claims Settlement Act was that, unlike the Passamaquoddy Tribe and Penobscot Nation, the Houlton Band would not have to get municipal approval for land to be placed in trust. MITSC also expressed support for having the Maliseets become members of the Commission on the same or similar terms as the Passamaquoddies and the Penobscots. The Legislature decided to hold over the bill until the Second Regular Session.

B. Trying to Reach Agreement

In December 1999, as part of its effort to help secure the bill's eventual passage, both the Commission's Chair and Executive Director participated in a meeting involving tribal and state representatives, which was organized by the Houlton Band to discuss the bill. During its January 2000 meeting, MITSC voted to support the Maliseet's draft of LD 2178, based on the understanding that the Houlton Band would be treated on the same basis as the Passamaquoddy Tribe and the Penobscot Nation. With one state MITSC member and one tribal MITSC member absent, that motion passed by a vote of five members in favor and two members abstaining. MITSC also voted in unanimous support of the addition of four seats to MITSC--two for the Maliseets and two more for the State.

In testimony on LD 2178 before the Judiciary Committee in January 2000, MITSC pointed out that there were still significant differences between what the Maliseets were seeking and what the State would support with regard to the bill. A major area of disagreement was whether the Houlton Band should sign a separate agreement stating that they agree that they are subject to the State's environmental laws. The State said it wanted to know what it would be agreeing to, but the Houlton Band said it should not be the only Tribe required to enter into a side agreement, especially when a number of areas in the agreement were under litigation.

The Judiciary Committee decided to give the parties more time to work on a compromise draft of LD 2178. In February 2000, MITSC facilitated meetings in Houlton and Bangor so tribal, state, and local officials could try to reach agreement. There were four major issues: the conversion of an existing 807 acres of trust land in Houlton and Littleton into Indian Territory; the process to use in the acquisition of additional lands to be included in Indian Territory; sustenance fishing rights on the river flowing through the 807 acres; and the exclusion of beano on the 807 acres.

The general purpose of the bill was to bring the Houlton Band into the Settlement Act on the same terms as the other two Tribes. However, during the negotiations, it became clear that, due to the location of Maliseet trust lands exclusively within the boundaries of organized municipalities, they could not become Indian Territory on same terms as lands added to Passamaquoddy and Penobscot Indian Territory (i.e. submitting to the permission of the legislative body of the organized municipality) and gain the desired status. Much of the discussion focused on figuring out how to get around this problem, but it was not possible to gain agreement from all the parties. During the negotiations, the State and the Maliseets came close to consensus, but the Maliseets and the City of Houlton were not able to work out their disagreements.

C. Disappointing Outcome

The idea of having a legislatively established commission try to resolve the issues, was under consideration for a short time. The Maliseets and MITSC both supported this idea. However, in the end, the Legislature simply killed LD 2178 without creating an ongoing mechanism to continue work on the issues raised by the bill. The defeat of this legislation was a tremendous disappointment for the Houlton Band of Maliseets.

9. Next Steps; Recommended Legislation

A. Passamaquoddy Land Legislation

As mentioned in Section 6-C, MITSC will begin its review of the addition of land in T19 MD to Passamaquoddy Indian Territory. MITSC urges the Legislature to carefully consider legislation introduced by Passamaquoddy Legislative Representative Donald Soctomah to add this land to Indian Territory.

B. Analysis of Core Differences

The Tribes and the State have fundamentally different views about the Settlement Act. There is enough ambiguity in the Act that both sides have been able come out with their own views.

Over the summer of 2000, MITSC members discussed whether they should analyze key areas of disagreement between the State and the Tribes. The completed analysis would go to key state and tribal lawmakers and policy-makers, who would have to understand these areas and come up with answers. In July 2000, an ad hoc committee of MITSC's Chair, a Penobscot MITSC member, and a representative of the Attorney General's office met to identify what issues need to be analyzed. Attachment 3 includes their preliminary list.

During MITSC's October 2000 meeting it was suggested that:

⇒ MITSC should move forward after a vote and memorialization that the analysis will not be used against any party in litigation; and

⇒ The analysis should look at: what the words say, the legal rationale, the cultural rationale, fears and concerns relating to the issue, and whether/where there is room for movement.

C. The Legislature and MITSC

When it comes to tribal-state relations MITSC is only one piece of the puzzle. MITSC members agree that the Legislature must become more intensively involved in tribal-state policy discussions. At times, the Legislature seems to consider MITSC as a legislative subcommittee or a lightning rod. The Legislature often refers complex, emotional tribal-state issues to MITSC rather than dealing with them directly. Removing these issues from the State House is unfortunate, because more legislators need to be knowledgeable about tribal-state relations. No one in the Legislature has the responsibility to look at the whole picture of tribal-state relations, and the existence of MITSC seems to perpetuate this lack of focus.

Pursuant to its statutory responsibility under 30 MRSA §6212(3) “to make such reports to the Legislature, the Passamaquoddy Tribe, and the Penobscot Nation as it determines appropriate,” MITSC intends to submit reports on at least a biennial basis concerning the effectiveness of the Settlement Act and the relationship between the State and the Tribes. MITSC also plans to bring together and facilitate meetings of higher level policy makers, including legislators, to address issues that MITSC cannot deal with effectively.

MITSC strongly urges the 120th Legislature to consider creating a new legislative mechanism for addressing tribal and tribal-state issues, such as a Joint Standing Committee on Indian Affairs or a Standing Subcommittee of the Judiciary Committee. MITSC also asks the Legislature to consider enacting the proposed bill included in Attachment 4 which would:

- ⇒ Allow MITSC to introduce bills relating to tribal-state issues;
- ⇒ Continue the annual Assembly of Governors and Chiefs begun pursuant to Resolves 1997, Chapter 45; and
- ⇒ Initiate a biennial Assembly of Legislators and Tribal Council Members.

D. Teaching Wabanaki History

MITSC’s Education Committee has identified a number of school-focused, government-focused, and community-focused initiatives to educate non-native people about the Wabanaki. One of the Committee’s top priorities is legislation to be sponsored by Penobscot Legislative Representative Donna Loring to make sure that Wabanaki history is taught in Maine’s public schools. MITSC will be giving this proposal very careful consideration and urges the Legislature to do the same.

E. Maliseet Legislation

If there are renewed efforts to bring the Houlton Band of Maliseets into the Settlement Act on similar terms as the Passamaquoddy Tribe and the Penobscot Nation, MITSC stands ready to help, if requested.

F. Continuation of \$15,000 in State Funding

As explained in Section 2-C, MITSC's state appropriation will decrease by \$15,000 in each year of the upcoming biennium unless the State appropriates this amount on a permanent basis. During the current biennium MITSC has operated with an annual income of just under \$62,000 from the State and the Tribes. The loss of \$15,000 would be a major setback, especially if there is agreement that MITSC should continue to play a substantial role in tribal-state relations. Governor Angus King has included this funding in his Part II Budget request for 2001-02 and 2002-03. MITSC respectfully requests that the 120th Legislature support the Governor's Part II request for the \$15,000.

Attachment 1**Resolves 1997, Chapter 45**

H.P. 926 - L.D. 1269

Resolve, to Foster the Self-governing Powers of Maine's Indian Tribes in a Manner Consistent with Protection of Rights and Resources of the General Public

Preamble. Whereas, there is conflict over the effect of the Act to Implement the Maine Indian Claims Settlement as evidenced by the introduction of legislation to give the Passamaquoddy Tribe authority to change the names of geographic features within Passamaquoddy territory; to eliminate the application of state law to tribal lands; to require full faith and credit for decisions of the tribal courts; and to make all persons within Passamaquoddy territory subject to tribal court jurisdiction; and

Whereas, the most basic function of the Maine Indian Tribal-State Commission, established as a part of the Act to Implement the Maine Indian Claims Settlement, is to "continually review the effectiveness of . . . [the Settlement] Act and the social, economic and legal relationship between the Passamaquoddy Tribe and the Penobscot Nation and the State and . . . make such reports and recommendations to the Legislature as it deems appropriate"; and

Whereas, we realize that the "[continual] review [of] the effectiveness of ... the social, economic and legal relationship between the Passamaquoddy Tribe and the Penobscot Nation and the State" requires an effort by and is of mutual interest to both the State and the Maine Indian Tribes to learn to better respect and honor the powers and duties of the State and the Indian tribes within the tribes' Indian territories; and

Whereas, we all pride ourselves on our abilities to listen, learn, identify and adapt to changing circumstances, especially with respect to the needs of our youth, both within the State and within the tribal territories; now, therefore, be it

Sec. 1. Maine Indian Tribal-State Commission authorized to focus on needs of youth. Resolved: That the Maine Indian Tribal-State Commission, established by the Maine Revised Statutes, Title 30, section 6212, is authorized and directed to undertake a systematic review of the civil laws of the State to determine the manner and extent to which those laws, as enforced, constrict or impinge upon the best interests of the children with respect to:

1. The traditional culture and way of life as practiced in the tribal communities;

2. The ability of the tribes to regulate their members, lands, schools and other cultural institutions and communities in a manner that honors tribal traditions without jeopardizing the resources of the State held for the benefit of all or the property or other rights of persons who are nonmembers of the Tribe; and

3. The respect and dignity appropriately given to all individual citizens in the State and members of the tribes; and be it further

Sec. 2. Study organization, objective; consultation, conflict resolution. Resolved: That the Maine Indian Tribal-State Commission study must be conducted over the next 4 years, in consultation with appropriate representatives of affected tribes and agencies of the State, including teachers and local law enforcement, and using conflict resolution techniques, to identify policies, programs or provisions that could be undertaken to foster the social and economic strength of both the State and Maine's tribal communities without significant risk of harm to the resources of the State held for the benefit of all, or the property or other rights of persons who are not members of the tribes and with special attention to the needs of the youth of both the State and the tribes.

The commission shall consider the concerns that gave rise to the legislation proposed by the Passamaquoddy Tribe to amend the Act to Implement the Maine Indian Claims Settlement and determine how those concerns may be addressed; and be it further

Sec. 3. Reporting dates established. Resolved: That the Maine Indian Tribal-State Commission shall report its findings and legislative recommendations to the Second Regular Session of the 118th Legislature by December 15, 1997; to the First Regular Session of the 119th Legislature by December 15, 1998; and to the First Regular Session of the 120th Legislature by December 15, 2000; and be it further

Sec. 4. Annual Assembly of the Governors and Chiefs. Resolved: That the Maine Indian Tribal-State Commission shall convene an annual Assembly of Governors and Chiefs, including the Governors of the State of Maine and the Passamaquoddy Tribe and the Chiefs of the Penobscot Nation, Houlton Band of Maliseets and Aroostook Band of Micmacs.

Effective September 19, 1997, unless otherwise indicated.

Attachment 2

Not available electronically.

Attachment 3**Draft Questions to be Addressed in Side-by-Side Analysis**

1. Should the treaty be interpreted in accordance with federal Indian common law? Or is this a unique relationship that should be interpreted in accordance state law only?
2. What is the definition of the Penobscot Indian Reservation as set forth in §6203(8)?
- 2a. Does Indian Territory extend to the thread of the river? To the shore? Does it include the whole riverbed?
3. What is the definition of the Passamaquoddy Indian Reservation as set forth in §6203(5)?
- 3a. Does the Passamaquoddy Tribe have control over salt water bodies that lie within their reservation?
4. Does “transfer” in §6203(13) apply to land within the reservations? Can it diminish what is within the historic reservations?
5. What is the meaning of §6206 regarding the Tribes having the powers and obligations of a municipality except for internal tribal matters? What is the relationship between the Tribes and the State defined by this language? To what degree does the language limit and to what degree does it expand the powers of the Tribes? What does “internal tribal matters” mean?
6. What is the role of the Federal Government in its trust relationship vis-a-vis the State?
7. What are sustenance fishing rights as defined in §6207(4)? What is included in this right? What is sustenance? Does the right include a right to control quality as well as quantity of the fish?
8. Who has the power to control the surface use of waters within the reservations and Indian Territory?
9. Is there a difference in the extent of jurisdiction of Tribes over their waters located in their trust lands and waters that are part of their reservations?
10. What is “business capacity” and what is “governmental capacity” under 6208(3), for example in relation to taxation issues?

Related Questions:

1. There is a concern about precedent: If the Tribes or the State engage in dialogue about these issues for MITSC, could that information be quoted in court by the other side? Can we created a protected forum for these discussions so that could not happen?
2. Do MITSC’s by-laws and procedures need to be amended? Should specific under-standings about what can and cannot be done with minority positions be included? Would doing so prevent a repeat of the problems encountered this past spring?
3. Do questions 1-10 affect the integrity of the Wabanaki culture? If yes, how?
Note: During MITSC’s 8/21/00 meeting, John Banks suggested that the analysis should look at the whether the questions affect cultural integrity.

Attachment 4**An Act to Authorize the Maine Indian Tribal-State Commission to Introduce Legislation and to Organize Assemblies of State and Tribal Leaders**

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 30 MRSA §6212, sub-§3, as amended by PL 1993, c. 600, Pt. A (amd); 25 (aff), is further amended to read:

3. Responsibilities. In addition to the responsibilities set forth in this Act, the commission shall continually review the effectiveness of this Act and the social, economic, and legal relationship between the Passamaquoddy Tribe and the Penobscot Nation and the State, and shall make such reports and recommendations as it determines appropriate.

The commission may introduce legislation relating to Act and the relationship between the State and the Tribes. In so doing, the Commission shall follow the instructions of, and meet all deadlines established by, the Legislature.

On an annual basis, the commission shall organize an Assembly of Governors and Chiefs to discuss issues relating to the Act and the relationship between the State and the Tribes. The commission shall invite the Governor of Maine, the Governors and Chiefs of all Tribal Governments in Maine, and the Tribal Legislative Representatives to participate in the Assembly.

On a biennial basis, the commission shall organize a Tribal-State Legislative Assembly to discuss issues relating to the Act and the relationship between the State and the Tribes. In consultation with the Tribal Legislative Representatives, the Commission shall invite representatives of the Maine State Legislature and Tribal Council members from all of the Tribal Governments in Maine to participate in the Assembly.

Seven members constitute a quorum of the commission and a decision or action of the commission is not valid unless 5 members vote in favor of the action or decision.

Statement of Fact

Under Resolves 1997, Chapter 45, the Maine Indian Tribal-State Commission was allowed to submit legislation as part of its reporting to the Legislature about the impact of Maine's civil laws on the Wabanaki. The bill authorizes the Commission to introduce legislation on an ongoing basis.

Chapter 45 also required the Commission to organize an annual Assembly of Governors and Chiefs. The bill continues the Assembly of Governors and Chiefs on annual basis and specifies that the Commission also will organize a Tribal-State Legislative Assembly on a biennial basis.

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- 1 Resolves 1997, Chapter 45 (Resolve, to Foster the Self-Governing Powers of Maine's Indian Tribes in a Manner Consistent with Protection of Rights and Resources of the General Public)
 2. MITSC Letter about NPDES
 3. Draft Questions to be Addressed in the Side-by-Side Analysis